Supreme Court of the United States

October Term, 1978

No. 78-490

Houston Distribution Services, Inc. and
Southwest Warehouse Services, Inc.
Petitioners,

v.

National Labor Relations Board,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The Petitioners, Houston Distribution Services, Inc. (HDS) and Southwest Warehouse Services, Inc. (Southwest) respectfully request a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on June 26, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 573 F.2d 260 (1978). The opinion of the National Labor Relations Board (Board) is reported at 227 N.L.R.B. No. 152

(1977). The decision of the Administrative Law Judge was rendered May 27, 1976 and a copy of said decision along with copies of the decision by the Court of Appeals and Board are included in the Appendix for the Court's reference and convenience.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was filed on June 26, 1978, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C.A. Sec. 1254 (1).

QUESTIONS PRESENTED

1. The proper test for determining union animus when good cause exists for discharge of the employees in question?

2. Whether the Administrative Law Judge's holding that a witness' competency to testify can be based on the color of his skin evidences such prejudicial conduct on the part of the Administrative Law Judge as to void his decision?

3. The proper test for burden of proof in successorship cases?

4. Whether the National Labor Relations Board may proceed against a wholly own subsidiary without a charge having been filed against the subsidiary as required by 29 U.S.C.A. Sec. 160 (b) [National Labor Relations Act]?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

Sec. 158 (a)(1) [Section 8 (a)(1) National Labor Relations Act]

"It shall be an unfair labor practice for an employer — to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Sec. 157 of this Title".

United States Code, Title 29:

Sec. 158 (a)(3) [Section 8 (a)(3) National Labor Relations Act]

"It shall be an unfair labor practice for an employer — by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .".

United States Code, Title 29:

Sec. 158 (a)(5) [Section 8 (a)(5) National Labor Relations Act]

"It shall be an unfair labor practice for an employer — to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Sec. 159 (a) of this Title".

United States Code, Title 29:

Sec. 160 (b)

"Whenever it is charged that any person had engaged in or is engaging in any unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes shall have the power to issue and cause to be served upon such person a complaint stating the charges in that respect and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint . . .".

United States Code, Title 29:

Sec. 160 (e)

> "The Board shall have power to petition any United States Court of Appeals, or if all the United States Courts of Appeals to which application may be made are in vacation, any District Court of the United States, within any Circuit or District, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order . . .".

United States Code, Title 28:

Federal Rules of Evidence, Rule 601

> "Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which state law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

29 CFR Secs. 101.10 (a), 102.39 (1976)

> The National Labor Relations Board is required to conduct its proceedings "so far as practicable" in accordance with the Federal Rules of Evidence.

Constitution of the United States

> Amendment V. No person shall be . . . deprived of life, liberty, or property, without due process of law: . . .".

STATEMENT OF THE CASE

In February of 1974, Petitioner Southwest was incorporated by Gary R. Stillwell who served as President and owned 100% of the outstanding stock. Southwest was in the warehousing of merchandise business operating from a facility located at 8052 Katy Freeway, Houston, Texas.

In October of 1974, Petitioner HDS was incorporated and Petitioner Southwest owned 100% of the outstanding stock. Mr. Stillwell served as its President. On December 28, 1974, HDS and Shippers Transportation and Storage, Inc. (Shippers) entered into a sale and purchase agreement of specific assets involving a warehouse facility located at 8095 Spikewood Drive, Houston, Texas. Shippers had previously been in the warehousing and trucking business operating from the Spikewood location. Shippers' operation of the Spikewood facility was pursuant to a Union contract. Southwest furnished HDS management services and rank and file employees under a management service contract on a cost plus basis. HDS had no rank and file employees. Southwest hired employees to work at the Spikewood location from a pool consisting of former employees of Shipper and individuals who responded to a newspaper advertisement. At the end of a 90-day probationary period when Southwest reached its "full complement of 12 unit employees", only four were former Shippers' employees.

In February of 1975, a charge was filed against HDS alleging discrimination in the failure to hire eight former employees of Shippers. In March of 1975, a second charge was filed against HDS alleging discrimination in the firing of five employees who were formerly employed by Shippers. No charge was ever filed against Southwest.

The Board found that Petitioners were a single employer consisting of two companies and that they violated Section 8 (a) (3) and (1) of the National Labor Relations Act, 29 U.S.C.A. Section 151 et. sec., by refusing to hire three employees formerly employed by its predecessor, Shippers, and by discharging four employees in order to avoid bargaining with the union. The Board further found that Petitioners were a successor employer and that a majority of their employees in an appropriate unit had designated

the union as their collective bargaining representative and that Petitioners had refused to bargain with the union in violation of Sections 8 (a) (5) and (1) of the Act. The Court of Appeals for the Fifth Circuit granted enforcement of the Board's order stating that by including the three individuals who were not hired and the four that were fired, the union had a majority when the full complement was reached.

BASIS FOR ORIGINAL FEDERAL JURISDICTION

The Petitioners were brought before the Court of Appeals for the Fifth Circuit to respond to the application of the Board for enforcement of its order issued against Petitioners pursuant to Section 10 (e) of the National Labor Relations Act, 29 U.S.C.A. Section 160 (e).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With the Decision Of the Court of Appeals For the First Circuit As To the Proper Test For Determining Union Animus In A Discharge Situation.

The Sixth Circuit in *Coletti's Furniture, Inc.* v. *N.L.R.B.*, 550 F.2d 1292 (1977) held in a Per Curiam opinion as follows:

> "Now that the Supreme Court in *Doyle,* [*Mt. Health School District Bd. of Education* v. *Doyle,* ..... *U.S.* ..... 97 S.Ct. 568, 50 L.Ed.2d 471 (1977)] in the analogous first amendment area, has held that an improper consideration is not 'substantial' if the discharge would have occurred in any event, marrying *Doyle* to our previous cases, there can be little reason for us to rescue the Board hereafter if it does not both articulate and apply our rule. Where there are both proper and alleged improper grounds for discharge, its burden is to find affirmatively that the discharge would not have occurred but for the improper reason".

A direct conflict between the Circuits was created respecting the proper test for determining union animus when good cause exists for discharge when the Fifth Circuit in the decision below specifically rejected the First Circuit's rule:

> "This Court has not adopted the 'but for' test for determining union animus advance by the First Circuit in *Coletti's Furniture, Inc.* v. *N.L.R.B.*, 550 F.2d 1292 (1st Cir. 1977)".

The conflict between the Circuits as to the application of the appropriate test renders a different result possible had this case arisen in the First Circuit rather than in the Fifth Circuit. The reasoning of the First Circuit is persuasive in that it places the burden upon the Board to show that the alleged union animus was the reason for the firings. The decision of the Fifth Circuit allows the Board to find discrimination where an employer has good cause for discharge of any employee and would discharge the employee anyway but also happens to be opposed to the unionization of his facility. The Fifth Circuit decision effectively gives guaranteed lifetime employment to union members regardless of their work performance as long as they stay active in an attempt to organize a facility.

2. The Decision Below Fails to Appropriately Address the Departure From the Accepted and Usual Course of Judicial Proceedings of the Administrative Law Judge In Holding That A Witness' Competency To Testify Can Be Based On the Color Of His Skin.

The Administrative Law Judge failed to allow Mr. Bret Griffin to testify concerning the work performance of certain of the employees that had been discharged. The testimoney was tendered to demonstrate that there was good cause for the discharge of the employees in question. The

Administrative Law Judge refused to allow Mr. Griffin to testify for, among other reasons, the fact that Mr. Griffin was white and all of the alleged discriminaties were black. The opinion below contains excerpts from the Judge's ruling on page 265.

The Court of Appeals held that the conduct of the Administrative Law Judge was in error, however, they denied to refuse enforcement of the Board's order because of the cumulative nature of the proposed testimony. Petitioner submits that the prejudice evidenced by the Administrative Law Judge in this ruling is of such a fundamental nature as to void his decision.

3. The Decision Below Raises A Significant And Recurring Problem Concerning the Proper Burden Of Proof In Refusal To Hire Cases.

Mr. Justice Marshall in *Howard Johnson Co., Inc.* v. *Hotel Employees,* 417 U.S. 249, 94 S.Ct. 2236, 2243 n. 8, L.Ed.2d 46 (1974) stated:

> "Thus, a new owner could not refuse to hire the employees of his predecessor solely because they were union members or to avoid having to recognize the union".

The Fifth Circuit has held that Mr. Justice Marshall's comment was not an attempt to formulate a test for burden of proof in a successorship case for refusal to hire. If indeed the Fifth Circuit is correct, then the issue of a proper test for burden of proof is ripe for a decision by this Honorable Court. If, on the other hand, Mr. Justice Marshall's comment is the appropriate test, then the Fifth Circuit erred in not following the appropriate test.

4. The Decision Below Raises Substantial Questions Concerning the Validity Of A Corporate Entity As An Employer Under the National Labor Relations Act.

The National Labor Relations Act in 29 U.S.C.A. Section 160 (b) provides that the Board shall have the power to proceed against an individual or entity only upon the filing of a charge against that individual or entity. As the Fifth Circuit recognized in the decision below, the Board is without power to initiate a proceeding without the benefit of an underlying charge. The Fifth Circuit, however, held that since HDS is a wholly owned subsidiary of Southwest a charge filed against HDS includes Southwest. The decision of the Fifth Circuit raises serious questions concerning possible application of other administrative enforcements against corporations who happen to own other corporations. The liability of utilizing subsidiaries to handle other aspects of a business for a parent is now in question as a result of the Fifth Circuit decision.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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Attorney for Petitioners

Dated: September 26, 1978.

CERTIFICATE OF SERVICE

I, DAVID T. MADDOX, attorney for Petitioners Houston Distribution Services, Inc. and Southwest Warehouse Services, Inc. hereby certify that on this 21st day of September, 1978, I have served three true and correct copies of the foregoing Petition For A Writ of Certiorari on Mr. Elliott Moore, Deputy Associate General Counsel, National Labor Relations Board, Office of the General Counsel, Washington, D. C., 20570 by mailing same through the United States mail to his address of record, air mail postage prepaid.

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DAVID T. MADDOX